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SUPREME COURT, U.S.

No. 07-1388

IN THE
Supreme Court of the United States

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

It is well-established by this Court that preemption of a state law by a federal statute can be implied as well as express. Boeing asserts that although the Washington Law Against Discrimination (WLAD) provides less protection to disabled workers than the Americans with Disabilities Act (ADA), it is not preempted because Congress did not expressly prohibit such laws. This novel argument utterly ignores this Court's Supremacy Clause jurisprudence, and frustrates Congress' purpose in enacting the ADA.

The WLAD falls below the minimum floor of protection established by the ADA. It is thus impliedly preempted under the Supremacy Clause because it frustrates the goals and objectives of Congress in eliminating discrimination against disabled persons.

B. This Court's Well-Established Precedent Contradicts Boeing's Novel Assertion that Preemption Can Only Be Express, Never Implied

Boeing notes in its brief in opposition that 42 U.S.C. § 12201(b) leaves in place those laws that provide "greater or equal protection for the rights of individuals with disabilities," opposition brief at 14, however, Boeing argues that federal statutes can only be interpreted to preempt state laws when Congress so provides, with "language in the statute." *Id.* This is a novel argument that must be addressed on reply.

The central question of Nolan's petition – which Boeing fails to address – is this: What effect does the ADA have on state laws, like the WLAD, that provide *lesser* protection for disabled persons? Congress drafted the ADA so as *not* to invalidate state disability laws, but *only* to the extent that those laws provide *greater or equal* protection than the ADA. Therefore, logic, precedent, and simple principles of statutory construction suggest that the ADA *does* invalidate laws providing lesser protection. It is this implied preemption that Nolan invokes in this case.

Express preemption is only one of many methods by which state laws can be preempted. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985). It is well-established that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824). In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area can be inferred if Congress "left no room" for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Ibid.; *see Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified

to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963). *See generally, Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699, 104 S. Ct. 2694, 2700, 81 L.Ed.2d 580 (1984).

Also, if a state law conflicts with a federal law and "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," the conflicting state law is preempted and/or invalidated. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984); *Hines v. Davidowitz*, 312 U.S. at 67. Even if the federal law does not expressly preempt conflicting state laws, this Court has found implied preemption when the state law frustrates the purpose of the federal law.

C. The ADA Impliedly Preempts the WLAD, Which Allows Employers to Fire Disabled Workers Without Engaging in the ADA-Mandated Interactive Process

Congress has identified the interactive process as "the primary means by which employees disabuse employers of their notions about the skills and abilities of employees with physical and mental impairments." H.R. Rep. No. 101-485, pt. 2 at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347. A disability discrimination statute that does not provide this protection represents a significant barrier to a person's right to equal employment opportunities. *Id.* Also, under the ADA, the interactive process must take place *before* any argument

can be made that the worker must demonstrate she can perform the essential functions of the job or that there is a precise accommodation available for the worker's disability. *Id.*

The WLAD, both facially and as applied by the Washington Court of Appeals in this case, provides less protection to disabled workers than the ADA, because it does not require that employers engage in an interactive process to reasonably accommodate disabilities. The Washington Court of Appeals concluded that the WLAD did not require an interactive process. The Court of Appeals also held that "the question of reasonable accommodation does not arise until the [disabled workers] show that they can do the essential functions of the job." *Lumper*, 2006 WL 3691663 at *7. *See also, Davis v. Microsoft Corp.*, 70 P.3d 126, 131-34 (Wash. 2003).

This Court should grant review and definitively resolve whether the ADA impliedly preempts state laws that provide less protection for disabled workers.

D. Boeing Improperly Asserts that It Engaged in an Interactive Process with Nolan; the Court of Appeals' Opinion Suggests Otherwise

Boeing contends that, despite denying that any such process was required by law, it nonetheless actually engaged in an interactive process with Nolan to accommodate her disability. Opposition brief at 15-17.

This contention has *no basis* in the opinion of the Washington Court of Appeals. A careful review of that

opinion reveals no factual background, nor any legal analysis, of whether Boeing engaged in an interactive process. *Lumper*, 2006 WL 3691663. Under the Court's factual recitation of Nolan's case, there is no mention of any process in which Boeing engaged Nolan. *Id.* at *1-2. Also, the Court of Appeals dismissed as legally inadequate Nolan's assertion that the interactive process is mandatory, without commenting on whether Boeing met this standard. *Id.* at *4-5.

In this case, Boeing violated the ADA in its application. The ADA requires Boeing to engage in a good faith interactive process, which would have identified Nolan's precise limitations, the essential functions of any job in question, and the barriers to Nolan performing the essential functions of such jobs. Only from this interactive process could Nolan and Boeing identify a reasonable accommodation, which would include any suggestion of modification if needed to allow her to perform the essential functions of the job in question. Boeing violated Washington law, insofar as that lesser law is preempted by ADA.

CONCLUSION

The decision of the Washington courts here strike at the heart of a central feature of the ADA – employers must undertake a reasonable accommodation of a disabled worker's disability by engaging in a mandatory interactive process with the worker on accommodation of the worker's disability. This process is designed to have employers and disabled workers work together to identify the essential functions of the worker's job, the worker's disability, and the available options to accommodate the worker to effectuate the goal of maintaining the disabled worker in gainful employment.

To the extent Washington state anti-discrimination law fails to provide for such a mandatory interactive process on reasonable accommodation of a worker's disability, or Washington law conditions a disabled worker's participation in such a mandatory process by requiring her to prove she can perform the allegedly "essential functions" of the job, it provides lesser protection to disabled persons and is preempted under 42 U.S.C. § 12201(b) in favor of the better protection of disabled persons found in the ADA.

This Court should accept review.

Respectfully submitted,

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